Supreme Court, U.S.
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No. 85-2161

IN THE

# Supreme Court of the United States

OCTOBER TERM 1986

MARY PETROWSKI, *Appellant*

*v.*

NORWICH FREE ACADEMY, ET AL., *Appellees*

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

## MOTION TO DISMISS

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## QUESTIONS PRESENTED ON MOTION TO DISMISS

1. Is a substantial federal due process question raised concerning *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where the appellant was not prevented from asserting her claims of unlawful termination in her statutory appeal from the dismissal order, but was merely prevented from pursuing a collateral attack before the state freedom of information agency?

2. Is a federal question properly raised where the appellant does not directly assert that a statute is unconstitutional, and where the appellant refers to due process but does not state whether she is referring to the U.S. or Connecticut Constitution or both?

## PARTIES TO PROCEEDINGS BELOW

The appellant has properly named all such parties.

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ON APPEAL FROM THE SUPREME COURT
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## MOTION TO DISMISS

---

Pursuant to Rule 16.1(b) of the Rules of the United States Supreme Court, appellee Norwich Free Academy moves that this appeal be dismissed on the grounds that:

(1) it does not present a substantial federal question; and

(2) the federal question sought to be reviewed was not properly raised and was not expressly passed on.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The appellant has properly quoted such provisions in her jurisdictional statement, pp. 2-7 (J.S. 2-7).

## STATEMENT

The appellant's statement should be supplemented as follows:

Petrowski's complaint to the Connecticut Freedom of Information Commission is reproduced in an appendix to this brief (app. 1a). It complains that the Norwich Free Academy board indicated it would meet on June 30, 1981 in executive session to decide the case, that she and her attorney requested permission to attend the meeting on June 30th, that permission was denied, and that she was not positive when or where the meeting took place.

The F.O.I.C. found Petrowski "was, in fact, aware that the respondent board would meet in executive session on July 2, 1981." (J.S. 8A, para. 32). It also concluded that "exclusion of the complainant from the July 2, 1981 executive session of the board of trustees of the respondent academy did not constitute a violation of [state law] (J.S. 9A, para. 40).

The F.O.I.C. nullified the dismissal, not for the reasons claimed by Petrowski, but because (1) the notice of the July 2 meeting was technically improper, (2) the vote (as opposed to deliberations) was not supposed to be in executive session, (3) the minutes did not disclose that findings prepared by the president were voted on by the board, and (4) the board went into executive session without stating the reasons (J.S. 8A, 9A, paras. 36, 41).

On appeal to the Connecticut Superior Court, ground (3) was reversed, but the other grounds were affirmed (J.S. 18A-20A). Norwich Free Academy appealed; Petrowski did not cross appeal. During the pendency of that appeal, the Connecticut Supreme Court decided *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 503 A.2d 1161 (1986), which held that the time requirements in C.G.S. §1-21i(b) were mandatory and the F.O.I.C.'s failure to comply with these requirements deprived it of jurisdiction.

The Appellant is mistaken in her contention that the court *sua sponte* raised the question in this case. Immediately after the *Zoning Board* case decision was issued on February 10, 1986, Norwich Free Academy filed a motion to add the issue decided in the *Zoning Board* case to its appeal (app. 2a-8a). The court then sent notice to all parties that it would decide whether the appeal should be sustained on the basis of the F.O.I.C.'s failure to comply with the mandatory time requirements. The only response made by Petrowski was a brief asserting that the statutory time period should be read in this case as directory rather than mandatory (J.S. 25A-28A). The brief does not explicitly state whether this is a statutory construction claim to avoid a constitutional challenge, or a constitutional claim, or both. Perhaps because she has not claimed that the F.O.I.C. has ever decided a case within 30 days, Petrowski refers to an equal protection issue only in passing. The brief also does not explicitly state what constitution is referred to. The Connecticut Supreme Court ruled in Norwich Free Academy's favor in an order without opinion (J.S. 22A).

When Norwich Free Academy dismissed Petrowski, she took an administrative appeal to the Connecticut Superior Court, alleging a multitude of issues including a violation of the F.O.I. Act (J.S. pp. 30A-32A). The court ruled for Norwich Free Academy on all issues except that it declined to rule on the F.O.I. claim (J.S. 33A-40A). Petrowski appealed to the Connecticut Appellate Court, abandoning all issues (including the F.O.I. claim) except the alleged conflict of interest of two board members (app. 9a). The Appellate Court agreed with Petrowski on the conflict claim, 2 Conn. App. 551, 481 A.2d 1096 (1984), but the Connecticut Supreme Court reversed, 199 Conn. 231, 506 A.2d 139 (1986). Petrowski has not requested review of that ruling in the United States Supreme Court and the judgment is now final.

## ARGUMENT

**1. Federal Question Insubstantial**

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), cannot seriously be relied upon because *Logan* involved a statutory review process specifically set up for an employee to invoke to test the legality of his firing. Unlike *Logan*, the challenged F.O.I.C. statute here did not confer the property right of continued employment. That property right arose from another statute and Petrowski did in fact invoke that statute's review process to test the legality of her firing by appealing to the Connecticut Superior Court; she ultimately lost on the merits before the Connecticut Supreme Court. She does not now question the fairness of that process.

*Logan* does not involve a collateral proceeding before another agency whose process Petrowski would have no more right to invoke than a disgruntled member of the press or citizen in the community. The Connecticut Supreme Court considered this distinction and found *Logan* inapplicable to the facts of *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 504, note 6, 503 A.2d 1161, 1164-65 (1986). She does not claim that the rights she was deprived of pursuing in the collateral action themselves implicated due process concerns (such as if she in fact did not know of the July 2 meeting). Indeed, if it were otherwise, presumably she would not have abandoned those rights in her direct appeal from the dismissal. The claims she made to the F.O.I.C. were ruled against her and she did not cross appeal. The remaining claims involved technical statutory violations raised by the F.O.I.C. itself. While she has a property right such that she cannot be dismissed without due process of law, she does not have a property right in the enforcement of the F.O.I. Act.

**2. Federal Question Improperly Raised**

Petrowski's brief before the Connecticut Supreme Court does not explicitly refer to the United States Constitution or the Connecticut Constitution. She does refer to due process and equal protection and she does cite *Logan*. One often cites a decision of this Court in state courts for its persuasive rather than its controlling authority. Citing *Logan* is not by itself a proper raising of a federal claim in a state court, for the presumption is that constitutional claims in state courts concern the state constitution. *Bowe v. Scott*, 233 U.S. 658, 665 (1914).

Nor does her brief make clear whether she is raising a statutory construction claim, a constitutional claim, or both. The ambiguity is important because a different analysis would have been required below depending upon which claim Petrowski was pursuing. The statutory construction analysis — that the 30-day rule should be construed to be directory rather than mandatory in order to avoid a constitutional question — is most consistent with the actual language of Petrowski's brief. The constitutional analysis — that the 30-day rule is mandatory and therefore violates due process — is not made in those terms in Petrowski's brief, nor does she discuss the severability of the 30-day rule from the rest of the statute. The record below fails to show that the federal claim was specifically presented so that the Connecticut Supreme Court could not have given judgment without deciding it. *Louisville & Nashville Railroad Co. v. Louisville*, 166 U.S. 709, 715 (1897).

## CONCLUSION

The appeal should be dismissed for want of a substantial federal question and for want of jurisdiction.

APPELLEE, NORWICH FREE ACADEMY

By _____

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Freedom of Information
Commission
30 Trinity St.
Hartford, CT 06115

74 West Main Street
P.O. Box 940
Norwich, CT 06360
July 30, 1981

Dear Sir or Madam:

My name is Deborah H. Benson. I am an attorney representing Mary Petrowski. My office phone number is 889-8471.

Mrs. Petrowski was involved in a hearing held pursuant to CONN. GEN. STAT. §10-151. She is a tenured teacher. Her employer, The Norwich Free Academy, terminated her employment contract by decision rendered July 2, 1981. Mrs. Petrowski requested a non-public hearing. Hearings were held May 21, 1981 and June 17, 1981. The Board of Trustees, who held the meetings, indicated that they would meet on June 30, 1981 in executive session to decide her case. As her attorney, I requested that Mrs. Petrowski and I be allowed to be present at the June 30, 1981 meeting. We were not so allowed, and in fact are not positive where or when the meeting took place. I believe this is in violation of CONN. GEN. STAT. §1-18a(e).

Therefore, I request a hearing pursuant to CONN. GEN. STAT. §1-21i.

If you so request, I shall be happy to supply the names and addresses of the 12 Trustees. Their chairman is James J. Dutton, Attorney, 22 Shetucket St., Norwich, CT 06360.

Very truly yours,
/s/ Deborah H. Benson

[original in manuscript]

NO. 12809
NORWICH FREE ACADEMY : SUPREME
vs. : COURT
FREEDOM OF INFORMATION : FEBRUARY 10,
COMM. ET AL : 1986

**MOTION FOR LEAVE TO FILE AN AMENDED PRELIMINARY STATEMENT OF ISSUES AND TO FILE A SUPPLEMENTAL BRIEF**

The plaintiff hereby moves for leave to file an amended preliminary statement of issues to add the following issue:

4. Did the FOIC violate the mandatory time requirements set out in C.G.S. §1-21i(b), thereby lacking jurisdiction to issue its February 23, 1983 decision?

The plaintiff also moves for leave to file the attached short supplemental brief on this issue.

PLAINTIFF, NORWICH FREE ACADEMY

By /s/ ALEXANDRA DAVIS

ALEXANDRA DAVIS
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, Connecticut 06105

*Its Attorneys*

ORDER

For good cause shown, the foregoing is hereby GRANTED/DENIED.

By the Court,

_____

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

| | | |
|---|---|---|
| NO. 12809 | | |
| NORWICH FREE ACADEMY | : | SUPREME |
| vs. | : | COURT |
| FREEDOM OF INFORMATION | | FEBRUARY 10, |
| COMM. ET AL | : | 1986 |

**SECTION 3098 STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMENDED PRELIMINARY STATEMENT OF ISSUES AND TO FILE A SUPPLEMENTAL BRIEF**

**1. Brief History**

Upon the decision of NFA to terminate her employment, defendant Petrowski filed a complaint with the defendant FOIC. NFA appealed the decision of the FOIC to the Superior Court. The Superior Court dismissed NFA's appeal, and from that dismissal NFA filed this appeal to the Appellate Court, and the Supreme Court then transferred it to itself.

**2. Specific Facts**

The plaintiff filed its brief on December 6, 1985. The defendants have yet to file their briefs, having obtained an extension of time for such filing to February 13, 1986. Furthermore, the Defendant FOIC has filed a motion for additional extension of time until March 14, 1986.

On February 4, 1986, the Supreme Court issued a decision in *Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, A.2d (1985), and the holding is relevant to this appeal.

**3. Legal Grounds**

The issue the plaintiff seeks to add is whether the FOIC violated the statutory time requirements of C.G.S. 1-21i(b) and therefore lacked jurisdiction to render its order declaring null and void the actions of the plaintiff.

In *Zoning Board of Appeals v. Freedom of Information Commission, supra* at 505, this Court held the time requirements of C.G.S. §1-21i(b) go "to the essence of the act" and are therefore mandatory. In so holding, this Court said:

> We are persuaded that the legislature intended that the failure of the FOIC to comply with the time limits for the hearing and adjudication of a complaint would nullify its subsequent action.

*Id.* at 505

In this appeal, from the face of the record alone, the issues of the statutory time requirements for action by the defendant FOIC is clearly discernible. In addition, the plaintiff's brief encompasses the necessary factual background for deciding this issue. Thus, no substantial briefing will be required on this issue. The plaintiff would submit no additional factual statement and would file the attached brief immediately after the Court grants leave.

This motion is not untimely. The issue to be added is jurisdictional, and can be raised at any stage of the judicial proceedings, including on appeal. *Circle Lanes of Fairfield, Inc. v. Fay*, 195 Conn. 534, 540, 489 A.2d 363 (1985); *Tucker v. Maher*, 192 Conn. 460, 469, 472 A.2d 1261 (1984). *Cf. Equitable Trust Co. v. Plume*, 92 Conn. 649, 657, 103 A. 940 (1918); *Wheeler v. New York, N.H. & H.R. Co.*, 71 Conn. 270, 282, 41 A. 808 (1898); *Olmsted's Appeal from Probate*, 43 Conn. 110, 114-15 (1875) ("If the information [concerning jurisdiction] does not come early, it must not be rejected if it comes late.")

The issue to be added is necessary to the just disposition of this appeal and its inclusion will not unfairly prejudice the defendants. In fact, since they have filed Motions for

Extension of Time, it should not cause delay in the progress of this appeal. The Motion to Amend the Preliminary Statement of Issues and to file a Supplemental Brief should be granted.

PLAINTIFF, NORWICH FREE ACADEMY

By ALEXANDRA DAVIS

ALEXANDRA DAVIS OF
MOLLER, HORTON & FINEBERG, P.C.
90 Gillett Street
Hartford, Connecticut 06105
*Its Attorneys*

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1985.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

[Proposed Supplemental Brief]
(To be Printed)

**SUPPLEMENTAL ARGUMENT**

4. The FOIC violated the mandatory time requirements set out in C.G.S. §1-21i(b) and therefore lacked jurisdiction to issue its February 23, 1983 decision.

While this issue was not specifically raised on the appeal to the Superior Court, the plaintiff is not barred from raising it now. All of the necessary facts to determine this issue were before the trial court and have been set out in the brief filed December 6, 1985. Most significantly, this

issue is one of jurisdiction and thus can be raised on appeal. As this court noted recently:

> Initially we must address the defendant's contention that the plaintiff had no right to appeal the action of the board and, hence, that the court had no jurisdiction. "The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage of the proceedings. Practice Book §3110. If at any point it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." *Laurel Park, Inc. v. Pac*, 194 Conn. 677, 678-79, n.1, S.2d (1984). If we conclude that the court lacks jurisdiction, it will be unnecessary to reach the merits of this appeal. See, e.g., *State v. Parker*, 194 Conn. 650, 657 N.7, A.2d (1984).

*Neyland v. Board of Education*, 195 Conn. 174, 487 A.2d 181 (1985).

In a decision that same year, the Court heard and decided an issue of jurisdiction even though the party had abandoned the argument. *Circle Lanes of Fairfield, Inc. v. Fay*, 195 Conn. 534, 540, 489 A.2d 363 (1985). This Court can and should decide an issue of jurisdiction even at this stage of the proceedings.

C.G.S. §1-2l(i)(g) reads in pertinent part:

> Said commission shall, within twenty days after receipt of the notice of appeal, hear such appeal after due notice to the parties and shall decide the appeal within thirty days after such hearing, by confirming the action of the agency or ordering the agency to comply forthwith with such relief as the commission, in its sound discretion, believes appropriate to rectify the denial of any right conferred by said sections.

In a case decided since the filing of the plaintiff's brief, this Court held that the time requirements set out in C.G.S. §1-21i(b) were mandatory and in so holding found:

> We are persuaded that the legislature intended that the failure of the FOIC to comply with the time limits for the hearing and adjudication of a complaint would nullify its subsequent action.

*Zoning Board of Appeals v. Freedom of Information Commission*, 198 Conn. 498, 505, A.2d (1986).

The defendant Petrowski filed her complaint with the FOIC on July 30, 1981 (br. 2). The FOIC held its first day of hearing on November 23, 1981, nearly four months after the complaint was filed (br. 2). On February 23, 1983, the FOIC rendered its final decision (br. 8). This was 1 year and 7 months after the complaint was filed and 1 year and 2 months after the hearing was concluded (br. 2, 8).

The failure to comply with a statutory deadline in an administrative proceeding deprives the agency of jurisdiction and renders the action taken null and void. *Akin v. Norwalk*, 163 Conn. 68, 74, 301 A.2d 258 (1972); *Donahue v. Zoning Board of Appeals*, 155 Conn. 550, 554, 235 A.2d 643 (1967). *Cf. Basilicato v. Department of Public Utility Control*, 197 Conn. 320, 497 A.2d 48 (1985) (failure to follow statutory requirements for appeal deprives the Court of jurisdiction to hear it.)

The failure of the FOIC to follow the statutory time requirements was blatant and substantial and such failure renders the February 23, 1983 decision null and void.

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS

ALEXANDRA DAVIS

| | | |
|---|---|---|
| NO. 12809 | | |
| NORWICH FREE ACADEMY | : | SUPREME COURT |
| vs. | : | JUDICIAL DISTRICT OF NEW LONDON |
| FREEDOM OF INFORMATION COMM., ET AL | : | FEBRUARY 10, 1986 |

**AMENDED PRELIMINARY STATEMENT OF ISSUES**

1. Does the Freedom of Information Act apply to Norwich Free Academy?

2. Were Norwich Free Academy's statutory and due process rights violated when the Commission made findings on issues neither alleged in the complaint nor addressed in the evidentiary hearing?

3. Did the Commission violate C.G.S. §4-179 or otherwise abuse its discretion, or act arbitrarily, by declaring the action of Norwich Free Academy null and void?

4. Did the FOIC violate the mandatory time requirements set out in C.G.S. §1-21i(b), thereby lacking jurisdiction to issue its February 23, 1983 decision?

PLAINTIFF, NORWICH FREE ACADEMY

By: /s/ ALEXANDRA DAVIS

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Hartford, CT 06105

CERTIFICATION

I hereby certify that a copy of the foregoing was mailed to all counsel of record on February 10, 1986.

/s/ ALEXANDRA DAVIS
ALEXANDRA DAVIS

[From Connecticut Supreme Court Record of *Petrowski v. Norwich Free Academy, et al.*, No. 12622]

## STATEMENT OF THE ISSUE

[From Plaintiff's Appellate Court Brief]

1. Did the defendant knowingly and willfully violate the plaintiff's rights to due process under Connecticut General Statutes §10-151 and the Fourteenth Amendment to the United States Constitution when Trustees Dutton and Tillinghast participated in the hearing and decision although they were disqualified?